



RESPONSE TRANSMITTAL

Applicant : Robert M. Hamilton, et al.
App. No. : 10/020,544
Filed : November 29, 2001
For : PORTABLE GAS POWERED
POSITIVE PRESSURE
BREATHING APPARTUS
AND METHOD
Examiner : Joseph Francis Weiss, Jr.
Art Unit : 3743

CERTIFICATE OF MAILING

I hereby certify that this correspondence and all marked attachments are being deposited with the United States Postal Service as first-class mail in an envelope addressed to: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450, on

May 19, 2004
(Date)

Pui Tong Ho, Reg. No. 44,155

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Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

MAY 26 2004

TECHNOLOGY CENTER R3700

Sir:

Transmitted herewith for filing in the above-identified application are the following enclosures:

- (X) Establishment of Right of Assignee to Take Action and Revocation and Power of Attorney in 2 pages.
- (X) Copy of Assignment in 12 pages.
- (X) Return prepaid postcard.
- (X) The Commissioner is hereby authorized to charge any additional fees which may be required, or credit any overpayment, to Account No. 41-1410.

Pui Tong-Ho
Registration No. 44,155
Attorney of Record
Customer No. 20,995
(949) 760-0404

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PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant : Robert M. Hamilton *et al.*
App. No. : 10/020,544
Filed : November 29, 2001
For : PORTABLE GAS POWERED POSITIVE
PRESSURE BREATHING APPARATUS
AND METHOD
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ESTABLISHMENT OF RIGHT OF ASSIGNEE TO TAKE ACTION
AND
REVOCATION AND POWER OF ATTORNEY

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

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Dear Sir:

The undersigned is empowered to act on behalf of the assignee below (the "Assignee"). A true copy of the original Assignment of the above-captioned application from the inventor(s) to the Assignee is attached hereto. This Assignment represents the entire chain of title of this invention from the Inventor(s) to the Assignee.

I declare that all statements made herein are true, and that all statements made upon information and belief are believed to be true, and further, that these statements were made with the knowledge that willful, false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, and that willful, false statements may jeopardize the validity of the application, or any patent issuing thereon.

The undersigned hereby revokes any previous powers of attorney in the subject application, and hereby appoints the registrants of Knobbe, Martens, Olson & Bear, LLP, 2040 Main Street, Fourteenth Floor, Irvine, California 92614, Telephone (949) 760-0404, **Customer No. 20,995**, as its attorneys with full power of substitution and revocation to prosecute this application and to transact all business in the U.S. Patent and Trademark Office connected

App. No. : 10/020,544
Filed : November 29, 2001

herewith. This appointment is to be to the exclusion of the inventor(s) and his attorney(s) in accordance with the provisions of 37 C.F.R. § 3.71.

Please use **Customer No. 20,995** for all communications.

Emergent Respiratory Products, Inc.

Dated: _____

May 10, 2004

By: _____



Hans Gregory Wood

Title: President and CEO

Address: 420 Exchange
Suite 250
Irvine, CA 92602

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AMENDED AND RESTATED ASSIGNMENT AGREEMENT

This AMENDED AND RESTATED ASSIGNMENT AGREEMENT ("*Agreement*") is made and entered into on this 14th day of November, 2003 ("*Amendment Effective Date*") between LIFE SUPPORT TECHNOLOGY, INC., a Florida corporation ("*LSTI*") and EMERGENT RESPIRATORY PRODUCTS, INC., a California corporation ("*ERP*"), based upon the following recitals:

RECITALS

WHEREAS, LSTI and Emergency Medical Technology Inc., the predecessor of ERP, ("*EMT*") entered into an Assignment Agreement dated January 1, 2002 ("*Original Assignment Agreement*"), pursuant to which LSTI assigned to EMT certain patent applications and other intellectual property and EMT agreed to pay certain royalties in consideration of such assignment; and

WHEREAS, the parties now desire to amend and restate the Original Assignment Agreement in its entirety to: (i) clarify the subject matter of the intellectual property assigned to ERP; (ii) remove the reversion right of LSTI to the assigned intellectual property; and (iii) amend the royalty payments owed by ERP to LSTI.

NOW, THEREFORE, based upon the foregoing, and for good and valuable consideration, the receipt of which is hereby acknowledged, the parties agree to amend and restate the Original Assignment Agreement, in its entirety, as follows:

Definitions. For the purposes of this Agreement, the defined terms below shall have the following meanings:

1.1 "*Assigned Patents*" means (i) the Pending Application; (ii) all patents issuing from or claiming priority from the Pending Application, including but not limited to continuations, continuations-in-part, divisionals, reexaminations, and reissues; and (iii) foreign counterparts of the patents and patent applications described in clauses (i) and (ii) above.

1.2 "*Effective Date*" means January 1, 2002.

1.3 "*First Commercial Sale*" means the date of initial transfer by ERP to an unrelated third party of a Product for compensation (or equivalent cash value for trades and any other such non-cash payments); provided, however, that the transfer of Products by ERP strictly for research and development purposes and/or clinical testing shall not constitute a First Commercial Sale for the purposes of this Agreement.

1.4 "*Net Sales*" means the gross amount received by ERP with respect to sales of Products in jurisdictions where such sales are covered by one or more Valid Claims or Pending Claims less (i) all trade, quantity and cash discounts, (ii) all credits and allowances upon claims, damaged goods, rejections or returns of a product, including recalls, and upon billing errors or inactive price reductions, (iii) freight, postage, shipping, insurance and transportation costs for delivery of product, to the extent billed, and (iv) excise, sales, value added, use taxes and other taxes (other than income taxes) or duties or governmental tariffs levied on, absorbed or otherwise

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imposed on sale of Products, all as determined in accordance with the standard accounting practices of ERP.

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1.5 **"Non-Patent Intellectual Property Rights"** means all copyrights, trade secret rights, and other proprietary rights but excluding any patent rights or trademark rights.

1.6 **"Pending Application"** means the patent application listed in Exhibit A.

1.7 **"Pending Claim"** means a claim of the Pending Application.

1.8 **"Product"** means a continuous positive airway pressure ventilator and breathing circuit including the patient value but excluding any stand-alone face mask and/or other devices or equipment not covered by a Valid Claim or Pending Claim.

1.9 **"Regulatory Approval"** means any approvals, licenses, registrations or authorizations of any country, federal, state or local regulatory agency, ministry, department, bureau or other governmental entity necessary for the marketing and sale of a Product.

1.10 **"Valid Claim"** shall mean a claim of an issued and unexpired Assigned Patent which has not been held permanently revoked, unenforceable or invalid by a decision of a court or other governmental agency of competent jurisdiction, unappealable or unappealed within the time allowed for appeal, or which has not been admitted to be invalid or unenforceable through reissue or disclaimer or otherwise.

2. ASSIGNMENT.

2.1 **Assignment of Assigned Rights.** LSTI hereby irrevocably and unconditionally, and without any right of reversion, sells, transfers, assigns and conveys to ERP all rights, title and interest in and to the Assigned Patents, including the right to recover damages for any past infringement (collectively, the **"Assignment"**). In connection with such transfer, as soon as practicable following the Amendment Effective Date, LSTI shall sign and deliver to ERP, all such documents as are reasonably necessary or otherwise reasonably requested by ERP in order to perfect and register the foregoing Assignment in the United States and any other relevant jurisdiction, including, without limitation, the Patent Assignment attached hereto as Exhibit B.

2.2 Patent Prosecution and Enforcement.

(a) **Prosecution.** ERP will have sole control over the filing, prosecution, and maintenance of the Assigned Patents (**"Prosecution"**). Within ten (10) days after the Amendment Effective Date, LSTI shall deliver to ERP the prosecution files of the Assigned Patents and otherwise cooperate with ERP in transferring the Prosecution responsibilities from LSTI to ERP.

(b) **Enforcement.** ERP will have sole control over enforcement and defense of the Assigned Rights against third-party infringers.

2.3 **LSTI Waiver and Quitclaim.** LSTI hereby waives and quitclaims to ERP any and all claims, of any nature whatsoever, which LSTI now has or may hereafter have for infringement by any third party of any of the Assigned Patents. Furthermore, LSTI

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acknowledges that: (a) it currently does not have and never had any ownership interest in and to U.S. Patent Application No. 10/313,526 titled "Pressure Face Mask and Nasal Mask" ("ERP Application") or any Non-Patent Intellectual Property Rights relating to the ERP Application or the Assigned Patents (collectively, "ERP Intellectual Property"); (b) it inadvertently attempted to assign ownership interest in ERP Intellectual Property to ERP in the Original Assignment Agreement; and (c) ERP owns all right, title, and interest in and to the ERP Intellectual Property. Notwithstanding the foregoing, to the extent LSTI has any ownership interest in and to any ERP Intellectual Property, LSTI hereby irrevocably and unconditionally assigns, releases and quitclaims to ERP the entire right, title, and interest whatsoever which LSTI may have in all ERP Intellectual Property.

2.4 Facilitation of Transfer. At ERP's request within a reasonable time after the Effective Date, LSTI shall cause to be delivered to ERP all originals and copies of or other tangible manifestations of the Assigned Patents of any sort in LSTI's possession or control constituting or relating to the Assigned Patents, to the extent such materials have not been transferred or are not in the possession or control of ERP prior to the Effective Date.

3. DEVELOPMENT OF PRODUCTS AND REGULATORY APPROVAL. ERP hereby covenants that it will (i) use commercially reasonable efforts to develop, at its sole cost and expense, for commercial use and market Products as soon as reasonably practicable, consistent with sound business practices, (ii) file and diligently prosecute the Pending Application, and (iii) in the event any Product requires Regulatory Approval prior to ERP's marketing or selling such Product in any relevant jurisdiction, ERP shall make application to the relevant regulatory authority and diligently pursue the application process to obtain such Regulatory Approval.

4. ASSISTANCE TO BE PROVIDED BY LSTI. LSTI shall provide to ERP all information and documents in its possession, or reasonably available to it, relating to the Assigned Patents as may be necessary to enable ERP to pursue the performance of its duties and obligation under this Agreement and to permit ERP to develop Products as required under this Agreement.

5. Royalties and Fees.

5.1 Royalties. In consideration of the assignment of the Assigned Patents hereunder, commencing on the First Commercial Sale, ERP shall be obligated to pay to LSTI the following royalty amounts during the Royalty Term:

(a) four percent (4%) of Net Sales in each of the first four calendar quarters after the First Commercial Sale.

(b) three percent (3%) of Net Sales in each of the second four calendar quarters after the First Commercial Sale.

(c) two percent (2%) of Net Sales in each of the third four calendar quarters after the First Commercial Sale.

(d) one percent (1%) of Net Sales in each of the fourth four calendar quarters after the First Commercial Sale and thereafter for the remainder of the Royalty Term.

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Notwithstanding the foregoing, the maximum amount of any royalties payable hereunder shall in no event exceed twenty-five thousand dollars (\$25,000) per quarter (the "Cap"). Any royalty payments that would otherwise be payable but for the Cap shall not be due and payable to LSTI and shall not carry over into subsequent quarters.

5.2 Royalty Term. ERP's obligation to pay royalties hereunder shall commence upon the First Commercial Sale and shall continue until either ERP has paid total cumulative royalties of six hundred thousand dollars (\$600,000) or ERP has elected to pay the lump sum provided in Section 5.5 (the "*Royalty Term*").

5.3 Timing of Payments. The payment of royalties by ERP to LSTI shall be made not later than the 15th day of the first month following the end of each calendar quarter, commencing with the first full calendar quarter ending after the date of the First Commercial Sale.

5.4 Books, Records and Audit. ERP shall keep, at all times, complete, true and correct books of account containing current records of all sales and other data in sufficient detail to enable the calculation of the fees payable under this Agreement to be verified. ERP agrees to permit an independent certified public accountant, selected by LSTI but acceptable to ERP, to have access to its records for inspection of accounts at reasonable times during normal business hours of ERP not more than once in each calendar year during the Royalty Term to verify the payments made hereunder. The cost of such independent certified public accountant shall be borne by LSTI; provided, however, in the event the audit discloses under-reported sales of five percent (5%) or greater than those reported to LSTI by ERP, the cost of the audit shall be borne by ERP.

5.5 Lump Sum Payment. Notwithstanding the foregoing, ERP shall have the right at any time in its sole and absolute discretion to satisfy its obligations under this Section 5 by payment to LSTI an amount that is the lesser of (i) three hundred thousand dollars (\$300,000) or (ii) six hundred thousand dollars (\$600,000) less total cumulative royalties paid to LSTI to date pursuant to Section 5.1. Upon such election and payment by ERP, all obligations and covenants of ERP set forth in Sections 3, 5, and 10.1 cease and be of no further force or effect with regard to ERP.

5.6 Waiver and Release. LSTI hereby irrevocably and unconditionally waives any rights it may have as a result of any failure by ERP to timely pay any fees and royalties owed to LSTI under the Original Assignment Agreement and releases and forever discharges ERP and its officers, directors, shareholders, employees, agents, and successors in interest from any and all claims, demands, suits, obligations, judgments, and rights of action of any nature, based on ERP's failure to timely pay any fees and royalties owed to LSTI under the Original Assignment Agreement. LSTI further waives all rights under Section 1542 of the California Civil Code, and any law or legal principle of similar effect in any jurisdiction, as such rights may relate to any such claims.

LSTI acknowledges that it has consulted with legal counsel regarding the import of Section 1542 of the California Civil Code, which provides as follows:

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A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.

6. **INDEPENDENT CONTRACTOR.** In performing its services under this Agreement, ERP shall be and act as an independent contractor and shall be responsible for the payment of wages and salaries to its employees together with all employee related benefits, if any, and shall be responsible for all federal and state tax withholdings, health and welfare benefits and other employee benefits and rights. ERP shall be responsible to pay for outside services and materials utilized in the course of performing its duties under this Agreement.

7. **Term.** The term of this Agreement shall commence on the Effective Date and shall expire upon expiration of the Royalty Term.

8. **REPRESENTATIONS BY LSTI.** LSTI represents and warrants to ERP all of the following:

8.1 LSTI is a corporation duly organized, validly existing and in good standing under the laws of the state of Florida and has the full power, right, and authority, corporate and otherwise, to execute, deliver and perform this Agreement in all respects, and has, by all necessary corporate action, duly and validly authorized the execution and delivery of this Agreement and its performance.

8.2 LSTI possesses all right, title and interest in and to the Assigned Patents necessary to effect the Assignment.

8.3 ERP shall receive all right, title, and interest in the Assigned Patents free and clear of any liens, encumbrances, claims, or agreements or understandings of any kind either written or oral which are inconsistent with the Assignment.

8.4 Using, making, selling, or importing a Product or performing a process as described in the Assigned Patents does not infringe or violate any patent, copyright, trade secret or any another proprietary right arising under the laws of the United States, any other jurisdiction or any treaty regime, all of which shall hereinafter be singularly or collectively referred to as "IP Rights".

9. **REPRESENTATIONS BY ERP.** ERP represents and warrants to LSTI all of the following:

9.1 ERP is a corporation duly organized, validly existing and in good standing under the laws of the state of California and has the full power, right, and authority, corporate and otherwise, to execute, deliver and perform this Agreement in all respects, and has, by all necessary corporate action, duly and validly authorized the execution and delivery of this Agreement and its performance.

9.2 ERP has adequate resources to enable it to perform its obligations hereunder.

10. **INDEMNIFICATION**

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10.1 Indemnification of LSTI. ERP shall indemnify, defend, and hold LSTI and its directors, employees, representatives, and agents (collectively, the "**LSTI Indemnitees**") harmless from and against any and all claims, demands, actions, costs, or liabilities, in whatever form (hereinafter "**Claims**"), including attorneys' fees and court costs at both trial and appellate levels for any loss, damage, or injury, to persons or property, or loss of life, caused by the use, testing, storage, handling or manufacture of Products developed, manufactured or sold by ERP; provided that (i) the LSTI Indemnatee promptly notifies ERP in writing after the LSTI Indemnatee receives notice of any Claim, and (ii) ERP shall have the right to have sole control of the defense, trial, and any related settlement negotiations relating to any Claim, or portion thereof, and (iii) the LSTI Indemnatee reasonably cooperates with ERP in the defense of any such Claim.

10.2 Indemnification of ERP. LSTI shall indemnify, defend, and hold ERP and its directors, employees, representatives, and agents (collectively, the "**ERP Indemnitees**") harmless from and against any and all Claims, including attorneys' fees and court costs at both trial and appellate levels, that allege that the practice or use of any Assigned Patents by ERP infringes or misappropriates any IP Rights of any third party; provided that (i) the ERP Indemnatee promptly notifies LSTI in writing after the ERP Indemnatee receives notice of any Claim, and (ii) LSTI shall have the right to have sole control of the defense, trial, and any related settlement negotiations relating to any Claim, or portion thereof, and (iii) the ERP Indemnatee reasonably cooperates with LSTI in the defense of any such Claim.

11. NOTICES

Any notice required or permitted hereunder shall be in writing and shall be sufficiently given when mailed postpaid first class registered mail and address to the party for whom it is intended at its record address, and such notice shall be effective as of the date it is deposited in the mail. The sending party shall send a copy of any such notice by facsimile to the facsimile number of the receiving party at the same time notice is mailed.

The record address of LSTI for this purpose is:

1302 Alta Mesa
Brea, California 92621
Fax: (562) 697-7853

The record address of ERP for this purpose is:

420 Exchange, Suite 250
Irvine, California 92602
Fax: (714) 263-3788

The address and facsimile number for receipt of notice may be changed, from time to time, by either party giving written notice to the other of the change.

12. CONFIDENTIALITY. LSTI acknowledges that it has had access to the prosecution files of ERP Application and the Assigned Patents and ERP Intellectual Property, which constitute confidential and proprietary information of ERP ("**ERP Confidential Information**"). LSTI acknowledges and confirms that maintaining the confidentiality of all ERP Confidential

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Information is of the utmost importance to ERP and that any disclosure of such ERP Confidential Information by LSTI may diminish the value and strength of the trade secrets and other information included therein. LSTI acknowledges that (a) it has no right to use any ERP Confidential Information, (b) it will not use or disclose to any third party any ERP Confidential Information, and (c) it has returned to ERP all tangible materials embodying any ERP Confidential Information.

13. GENERAL PROVISIONS.

13.1 Governing Law; Venue. This Agreement shall be governed solely and exclusively by and construed in accordance with the internal laws of the State of California, as applied to agreements entered into in California by California residents. Except for each party's right to seek equitable or injunctive relief wherever it deems appropriate in order to enforce, perfect or otherwise in connection with its rights under this Agreement, any action or proceeding arising from or relating to this Agreement shall be brought solely and exclusively in federal court in the Southern District of California or in state court in Orange County, California, and each party irrevocably submits to the jurisdiction and venue of any such court in any such action or proceeding.

13.2 Severability. If for any reason a court of competent jurisdiction finds any provision of this Agreement invalid or unenforceable, then that provision of the Agreement shall be enforced to the maximum extent permissible and the other provisions of this Agreement shall remain in full force and effect.

13.3 Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original, but both of which together shall constitute one and the same instrument.

13.4 Entire Agreement. This Agreement and Exhibits A and B constitute the complete and exclusive agreement between the parties with respect to the subject matter hereof, superseding and replacing any and all prior and contemporaneous agreements (including the Original Assignment Agreement), communications, and understandings (both written and oral) regarding such subject matter.

13.5 Modification and Waiver. No modification to this Agreement, nor any waiver of any rights, shall be effective unless consented to in writing by both parties. The failure of a party to enforce at any time any of the provisions of this Agreement, or the failure to require at any time performance by one or both of the parties of any of the provisions of this Agreement, shall in no way be construed to be a present or future waiver of such provisions, nor in any way affect the ability of a party to enforce each and every such provision thereafter.

13.6 Captions and Headings. The captions and headings contained in this Agreement are for convenience of reference only and shall not modify, define, limit or otherwise affect the meaning of any of the terms or provisions hereof.

13.7 Attorneys' Fees. In the event of any litigation, arbitration or other proceeding by which one party seeks either to enforce its rights under this Agreement, in any nature, or seeks a declaration of any rights or obligations under this Agreement, the prevailing party shall be

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provided reasonable attorneys' fees, together with any costs and expenses, to resolve the dispute and to enforce any final judgment.

13.8 Assignment. This Agreement shall not be assignable by a party hereto without the written consent of the other party, which consent will not be unreasonably withheld, except that either party may assign or otherwise transfer this Agreement and the rights and obligations hereunder without the other party's consent to any successor to all or substantially all of its business or assets to which this Agreement pertains, whether by merger, sale, operation of law or otherwise. Any assignment in violation of this Section shall be null and void. This Agreement shall be binding upon and inure to the benefit of the permitted successors and assigns of the parties.

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IN WITNESS WHEREOF, the parties have caused this Agreement to be made and entered into as of the Effective Date.

Life Support Technology, Inc.

By: Robert M. HamiltonName: Robert M. HamiltonTitle: PRESIDENT

Emergent Respiratory Products, Inc.

By: Hans Gregory WoodName: Hans Gregory WoodTitle: President + CEO

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[SIGNATURE PAGE TO ASSIGNMENT AGREEMENT]

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EXHIBIT A

PENDING APPLICATION

APPLICATION No.	TITLE	INVENTORS	FILING DATE
10/020,544	Continuous Positive Airway Pressure Apparatus and Method; Portable Gas Powered Positive Pressure Breathing Apparatus and Method	Robert Hamilton & Anthony Gambone	Original Filing Date is November 29, 2001

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EXHIBIT B

ASSIGNMENT OF PATENT APPLICATION

WHEREAS, LIFE SUPPORT TECHNOLOGY, INC., a Florida corporation, ("Assignor") owns all right, title, and interest in and to the U.S. patent application listed in Schedule A (the "Patent Application"); and

WHEREAS, EMERGENT RESPIRATORY PRODUCTS, INC., a California corporation, ("Assignee"), desires to acquire Assignor's entire right, title, and interest in and to the Patent Application, and in and to the inventions disclosed in the Patent Application, and to the Future Patents (as hereinafter defined);

NOW THEREFORE, for and in consideration of One Dollar (\$1.00) and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Assignor does hereby sell, assign and transfer unto Assignee, its successors, assigns and legal representatives, all right, title, and interest in and to the Patent Application, and to all future patents which may be granted therefor throughout the world, and all divisions, reissues, reexaminations, substitutions, continuations-in-part, utility conversions, and extensions thereof (collectively, "Future Patents"), together with all claims, causes of action and damages for past infringement, if any, of said Patent Application and Future Patents; and Assignor hereby authorizes and requests the United States Patent and Trademark Office and other patent offices throughout the world to issue all Future Patents resulting therefrom insofar as Assignor's interest is concerned, to Assignee.

Assignor also hereby sells, assigns, and transfers to Assignee and its successors, assigns, and legal representatives all right, title, and interest to the inventions disclosed in the Patent Application and Future Patents throughout the world, including the right to file applications and obtain patents, utility models, industrial models and designs for such inventions in Assignee's own name throughout the world including all rights of priority, all rights to publish cautionary notices reserving ownership of such inventions, and all rights to register such inventions in appropriate registries; and Assignor further agrees to execute any and all powers of attorney, applications, assignments, declarations, affidavits, and any other papers in connection therewith reasonably necessary to perfect such right, title, and interest in Assignee and its successors, assigns and legal representatives.

IN WITNESS WHEREOF, Assignor has caused this instrument to be executed by its duly authorized corporate officer, effective this first day of January, 2002.

LIFE SUPPORT TECHNOLOGY, INC.

By: Robert M. HankersonName: Robert M. HankersonTitle: President

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SCHEDULE A

PATENT APPLICATION

APPLICATION No.	TITLE	INVENTORS	FILING DATE
10/020,544	Continuous Positive Airway Pressure Apparatus and Method; Portable Gas Powered Positive Pressure Breathing Apparatus and Method	Robert Hamilton & Anthony Gambone	Original Filing Date is November 29, 2001

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